

NA 04-0003-C H/H Berry v McDermid
Judge David F. Hamilton

Signed on 08/01/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ROLAND V. BERRY,)	
)	
Plaintiff,)	
vs.)	NO. 4:04-cv-00003-DFH-WGH
)	
MCDERMID TRANSPORTATION, INC.,)	
DALLAS W. HANSEN,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ROLANDA V. BERRY,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 4:04-cv-0003-DFH-WGH
)	
MCDERMID TRANSPORTATION,)	
INC., and DALLAS W. HANSEN,)	
)	
Defendants.)	

ENTRY ON DEFENDANTS' MOTION TO BAR EXPERT TESTIMONY

This diversity jurisdiction case arises out of an accident that occurred in February 2003. Plaintiff Rolanda Berry has alleged that defendant Dallas Hansen, an employee of defendant McDermid Transportation, negligently crashed his semi-tractor trailer into her car. The plaintiff alleges physical and emotional injuries.

Defendants have moved to exclude two aspects of expert testimony plaintiff intends to offer. First, defendants move to exclude the opinion of a family therapist, Sally DiGiovanni, L.M.F.T., who opines that the plaintiff suffered from post-traumatic stress disorder on the ground that she is not sufficiently qualified to diagnose the disorder. The defendants also move to exclude the testimony of

David Changaris, M.D., who opines that the plaintiff's hip was fractured in the accident.¹ The court grants the defendants' motion on both issues.

Discussion

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. The court's role in applying Rule 702 is to be a "gatekeeper." *Daubert*, 509 U.S. at 589. In its role as gatekeeper, the court must consider both the relevance and reliability of the proffered evidence. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). In this case, the proffered testimony would be relevant to damages. The issue is whether it is sufficiently reliable to admit it for the jury's consideration.

¹The defendants also moved to exclude any testimony offered by Dr. Changaris as it related to a diagnosis of avascular necrosis (AVN). The plaintiff responded by saying that Dr. Changaris will not offer any opinions as to AVN. Plaintiff is not claiming she suffers from AVN.

I. *Family Therapist's Diagnosis of Post-Traumatic Stress Disorder*

The plaintiff intends to call Sally DiGiovanni, a licensed marriage and family therapist, who will testify that as a result of the collision, the plaintiff has suffered psychological damages. DiGiovanni diagnosed the plaintiff with post-traumatic stress disorder. In her expert witness disclosure, the plaintiff identified DiGiovanni as a licensed psychologist. DiGiovanni revealed in her curriculum vitae and deposition that she is neither a psychologist nor a psychiatrist, but rather a licensed marriage and family therapist. DiGiovanni Dep. 6. The defendants have moved to exclude DiGiovanni's diagnosis of post-traumatic stress disorder on the grounds that she lacks the qualifications to provide such an opinion to the court.

Defendants state in their brief that DiGiovanni testified that post-traumatic stress disorder is a medical diagnosis and can be treated by medication. DiGiovanni Dep. 32.² DiGiovanni does not have a formal medical background. She has a masters degree in counseling, followed by supervising training. DiGiovanni Dep. 6. She is licensed to practice in Indiana and Kentucky. The plaintiff asserts that DiGiovanni's 24 years of work with traumatized patients,

²Defendants cite page 57 of DiGiovanni's deposition for her statement that post-traumatic stress disorder is a medical condition, but defendants have not provided the court with this page of DiGiovanni's deposition. However, DiGiovanni testified that she used DSM-IV (Diagnostic and Statistical Manual of Mental Disorders), published by the American Psychiatric Association, to make the diagnosis of post-traumatic stress disorder, DiGiovanni Dep. 14. The court agrees with the defendants' assertion that post-traumatic stress disorder is a medical diagnosis.

DiGiovanni Dep. 24, render her qualified to testify that the plaintiff suffers from post-traumatic stress disorder. The court disagrees.

To testify as an expert on medical questions, DiGiovanni needs sufficient qualifications. *Wintz v. Northrop Corp.*, 110 F.3d 508, 513 (7th Cir. 1997) (affirming exclusion of opinion by toxicologist who was not a licensed physician or surgeon as to whether plaintiff's conditions were caused by exposure to bromide); *Stutzman v. CRST, Inc.*, 997 F.2d 291, 296 (7th Cir. 1993) (in pre-*Daubert* case, as long as a medical expert's qualifications are proper and the expert relies on appropriate types of information under Rule 703, district court does not abuse discretion by admitting testimony); cf. *Backes v. Valspar Corp.*, 783 F.2d 77, 79 (7th Cir. 1986) (stating that non-physician may testify about cause of illness in a proper case).

Individuals who lack medical degrees understandably may face difficulties in asking a court to treat them as qualified to testify as to medical questions. In *Jones v. Lincoln Electric Co.*, the Seventh Circuit held that a witness who had a mechanical engineering degree but who lacked a medical degree or medical training was not qualified to give expert testimony on medical questions about the effects of manganese and manganese fumes on the human body. 188 F.3d 709, 723-24 (7th Cir. 1999). The court reasoned that the conclusions were rooted in medical knowledge and training that the witness did not have. Similarly, in *Stutzman*, the Seventh Circuit affirmed the trial court's decision to bar a physical

therapist from offering a medical prognosis for the long-term effects of physical therapy on the plaintiff's ability to return to work. 997 F.2d at 298.

In *Walker v. Soo Line Railroad Co.*, the plaintiff was injured when lightning struck the tower in which he was working. 208 F.3d 581, 585 (7th Cir. 2000). Dr. Capelli-Schellpfeffer headed the clinical team at the University of Chicago who treated the plaintiff. *Id.* at 588. Although not a psychiatrist or psychologist, Dr. Capelli-Schellpfeffer had expertise in electrical trauma and diagnosed the plaintiff with post-traumatic stress disorder. *Id.* at 588-89. The district court excluded Dr. Capelli-Schellpfeffer's diagnosis of post-traumatic stress disorder because she was not a psychiatrist or psychologist. *Id.* at 588. The Court of Appeals reversed with the following explanation:

Here, the district court found Dr. Capelli-Schellpfeffer to be an expert on the subject of electrical trauma. As part of that expertise, she naturally would be expected to have expertise on the subject of whether electrical injuries could cause post-traumatic stress disorder. *Dr. Capelli-Schellpfeffer is not a psychiatrist and well might not be able to render an opinion about diagnosing post-traumatic stress disorder on the basis of something other than electrical trauma.* However, as the leader of a clinical team specializing in electrical trauma, who reasonably relied on the expert opinions of specialists who also examined Mr. Walker, her conclusion that Mr. Walker suffered from post-traumatic stress disorder was a professional opinion that the jury had the right to consider.

Id. at 589 (emphasis added). The Seventh Circuit thus limited the doctor's testimony about diagnosing post-traumatic stress disorder to the narrower area of her expertise.

DiGiovanni's area of expertise lies in the area of marriage and family therapy. The plaintiff has failed to provide the court with any legal authority supporting her contention that DiGiovanni, a family therapist, is qualified to testify to a diagnosis of post-traumatic stress disorder, at the very least for trauma unrelated to a marriage or family issue. This case involves claims of trauma in an automobile accident, not marriage or family issues. The diagnosis here clearly falls outside DiGiovanni's area of expertise.

The diagnosis also falls outside the scope of DiGiovanni's licensure. See Ky. Rev. Stat. § 335.300(4) (confining the practice of licensed marriage and family therapists to conditions relating to marital and family dysfunctions); Ind. Code § 25-23.6-1-7 (defining the practice of marriage and family therapy to include counseling and psychotherapeutic techniques but limiting treatment to the context of family, marital and relational systems). DiGiovanni lacks a medical degree and the medical diagnosis here falls outside her area of statutorily-defined limitations. DiGiovanni does not have the professional training and credentials needed to offer reliable testimony that this plaintiff suffers from post-traumatic stress disorder due to an automobile accident.

The court's decision does not prohibit DiGiovanni from testifying at trial about plaintiff's emotional condition, based on her counseling session. But DiGiovanni may not testify that the plaintiff suffers from post-traumatic stress disorder.

II. *Dr. Changaris' Testimony*

The plaintiff intends to call Dr. David Changaris, a board certified neurosurgeon and pain management specialist. Plaintiff expects him to testify, among other matters, that the plaintiff fractured her left acetabulum, or hip socket, in the accident. The defendants, on the other hand, have disclosed John Balthrop, M.D., a medical witness who opines that the plaintiff's left hip injury is the result of arthritis and a degenerative cyst, and not the result of a hip fracture. The defendants argue that Dr. Changaris' testimony as to the hip fracture is speculative and should be excluded. The court agrees.

The court's role as "gatekeeper" requires the court to ensure that scientific testimony is grounded in the "methods and procedures of science." *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344 (7th Cir. 1995), quoting *Daubert*, 509 U.S. at 590. The testimony cannot simply be "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. An opinion becomes speculative when too wide of an analytical gap exists between the data and the opinion provided. *Target Market Publ'g, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1144

(7th Cir. 1998) (affirming exclusion of expert opinion on expected revenues using unrealistic assumptions), citing *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); see also *Beachler v. Amoco Oil Co.*, 112 F.3d 902, 909 n.6 (7th Cir. 1997) (affirming exclusion of opinion that refiner's assignment of service station franchise agreements would harm dealers; testimony was speculative and not supported by any factual foundation).

Dr. Changaris ordered a CT scan of the spine in March 2003, and a bone scan in April 2003. Changaris Dep. 31, 34. The bone scan resulted in an "abnormal uptake." Dr. Changaris testified in his deposition that an abnormal uptake in a bone scan could mean one of three things: 1) a fracture or significant "bony change"; (2) cancer; or (3) degenerative spine [*sic* - bone?] disease. *Id.* at 32. Dr. Changaris also stated that a bone scan itself cannot differentiate among the three possibilities, and so he referred the patient to another doctor for additional help. *Id.* at 33. Later in his deposition, Dr. Changaris testified that based on the patient's history, and the fact that her hip problems did not exist before the accident but existed after the accident, he "strongly suspected" that she had suffered a hip fracture in the accident. *Id.* at 39-40.

Dr. Changaris initially referred the plaintiff to Dr. Frank Bonnarens, who thought the plaintiff suffered from a tumor or a cyst. *Id.* at 33. Dr. Changaris testified in his deposition that he believes Dr. Bonnarens referred the plaintiff to Dr. Balthrop. *Id.* Dr. Balthrop ordered a second bone scan, which revealed an

abnormal process occurring in the plaintiff's hip. Balthrop Dep at 31-32. Dr. Balthrop testified that additional radiologic tests are needed to determine the cause of an abnormal bone scan. *Id.* After the bone scan, Dr. Balthrop ordered an MRI, *Id.* at 32, and from that test concluded that the plaintiff suffered from minor arthritis in her hip with a degenerative cyst. *Id.*

Both Dr. Changaris and Dr. Balthrop agree that the bone scan results can indicate a number of problems, and that further studies are needed to identify the problem definitively. Dr. Balthrop has performed the necessary additional studies. Dr. Changaris has not. A further test – such as an MRI or CT scan of the hip – would have allowed Dr. Changaris to identify the problem and to resolve the problem scientifically. The court understands Dr. Changaris' reasoning based on the patient's medical history. If there were no other evidence available on the issue, that reasoning might be deemed sufficiently scientific to be reliable. In light of the availability of a scientific test that would resolve the issue definitively, however, Dr. Changaris' choice to testify to an opinion without knowing the results of an available and definitive test cannot be deemed reliable. Without this test, the analytical gap between the data and Dr. Changaris' conclusion is too wide. Dr. Changaris and the plaintiff chose not to conduct this additional test. His diagnosis is too speculative to be deemed reliable enough to present to the jury. Dr. Changaris may not testify that the plaintiff suffered from a hip fracture in the accident.

Conclusion

The court grants the defendants' motion to exclude both of the challenged opinions of Sally DiGiovanni and Dr. Changaris. Finally, counsel for both parties should know before trial that the court does not "certify" or declare witnesses to be "experts" when "tendered" as such at trial. Instead, if there is an objection to an offered opinion, the court will consider the objection. The court's jury instructions will refer to "opinion witnesses" rather than "expert witnesses."

So ordered.

Date: August 1, 2005

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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